SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION -- FELONY BRANCH

UNITED STATES OF AMERICA	:	**Case No. 2009CF1009230**
	:	
v.	:	**Hon. Gerald I. Fisher**
	:	
INGMAR GUANDIQUE	:	

UNDER SEAL

MOTION TO SEAL GOVERNMENT'S *EX PARTE* MOTION FOR PROTECTIVE ORDER AND ALL ATTACHMENTS THERETO

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully moves the Court for an order directing that the Government's *Ex Parte* Motion for Protective Order, the disclosure letter attached thereto, and any Protective Order entered by the Court, be filed under seal. In support of its motion, the government states as follows:

The Government's *Ex Parte* Motion for Protective Order and the disclosure letter attached thereto contain highly sensitive information regarding, among other things, two open homicide investigations, as well as information identifying a witness who was interviewed by law enforcement in those investigations. The witness who was interviewed by law enforcement defected from a violent criminal street gang with deep ties to other powerful gangs, including gangs with international reach.

To expose the government's motion and the attached disclosure letter to public review at this time would place the witness and his family at great risk of death or serious bodily harm. It would also significantly undermine the investigative efforts currently being undertaken by the law enforcement agency investigating the homicides.

WHEREFORE, for the foregoing reasons, the government respectfully requests that this motion to seal be granted.

Sincerely,

RONALD C. MACHEN JR.
United States Attorney

By: F. Campoamor

Fernando Campoamor-Sánchez
Assistant United States Attorney

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
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ORDER

Upon consideration of the Motion to Seal Government's *Ex Parte* Motion for Protective Order and All Attachments, it is this _____ day of November, 2012, hereby

ORDERED, that the Government's Motion is hereby **GRANTED** and the Motion to Seal Government's *Ex Parte* Motion for Protective Order and All Attachments Thereto; Government's *Ex Parte* Motion for Protective Order and the attached disclosure letter; and the Protective Order entered by the Court, shall all be filed under seal until further order of the Court.

SO ORDERED.

_____
Gerald I. Fisher
Associate Judge

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
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UNITED STATES OF AMERICA	:	**Case No. 2009CF1009230**
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UNDER SEAL

GOVERNMENT'S *EX PARTE* MOTION FOR PROTECTIVE ORDER

The United States, by and through its attorney, the United States Attorney for the District of Columbia, respectfully moves for a protective order governing the disclosure of certain newly discovered information in this case. In support of this motion, the government states the following:

1. On November 22, 2010, the defendant was found guilty of first degree felony murder (kidnaping) and first degree felony murder (attempted robbery) following a jury trial. On February 11, 2011, the defendant was sentenced to concurrent terms of imprisonment of 60 years on each count.

2. Approximately one year after the defendant was sentenced, the government was contacted by another United States Attorney's Office at the behest of a local law enforcement agency. Following that initial contact, the government learned new information regarding a witness in this case. The information is described in an *ex parte* letter to the Court dated November 13, 2012. The letter sought guidance from the Court regarding whether the information should be disclosed to the defense, and also outlined the government's significant witness security concerns if the Court advised the government to disclose the information.

3. On November 16, 2012, the Court advised the government to disclose the information to the defense and indicated that it would enter a protective order governing the further disclosure of the information. A copy of the disclosure letter and a proposed protective order are attached hereto as Exhibits A and B.

WHEREFORE, the United States respectfully requests that the Court enter the attached protective order.

Sincerely,

RONALD C. MACHEN JR.
United States Attorney

By: _____
Fernando Campoamor-Sánchez
Assistant United States Attorney

EXHIBIT A

U.S. Department of Justice

Ronald C. Machen Jr.
United States Attorney

District of Columbia

Judiciary Center
555 Fourth St., N.W.
Washington, D.C. 20530

November 21, 2012

*****CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER*****

VIA HAND DELIVERY
Santha Sonenberg, Esq.
Maria Hawilo, Esq.
The Public Defender Service for the District of Columbia
633 Indiana Ave, NW
Washington, DC 20004

Re: *United States v. Ingmar Guandique*
Case No. 2009CF1009230

Dear Counsel:

The following information is being provided to you pursuant to the enclosed protective order signed by the Honorable Gerald I. Fisher in the above-referenced case.

As you know, when Armando Morales testified at trial, he was serving a lengthy prison sentence arising from his 1996 arrest on gun and drug charges in the Eastern District of California (EDCA) and his 1997 guilty plea in that case. After his testimony, Mr. Morales was imprisoned [redacted] and our Office was made the point of contact for him. Approximately one year after sentencing in the Guandique case, our Office was contacted in reference to a request by the Fresno County Police Department (FCPD) about Mr. Morales. Our Office contacted the U.S. Attorney's Office in the Eastern District of California (USAO–EDCA) to learn more about the request. Through a conference call with FCPD detectives that was later arranged by the USAO-EDCA at our request, we learned that the FCPD was attempting to locate Mr. Morales because it had recently discovered transcripts of two interviews that the Fresno County Sheriff's Department (FCSD) had conducted of Mr. Morales in June 1998, while Mr. Morales was incarcerated at the U.S. Penitentiary in Atlanta, Georgia.[1] We were provided transcripts of these

[1] The Fresno County Sheriff's Office and the Fresno County Police Department are separate and distinct law enforcement agencies.

1998 interviews. The transcripts reflect that Mr. Morales provided the FCSD in 1998 with information about two homicides that occurred in California before his incarceration in 1996. He did not identify the other people who were involved in the crimes, but [redacted] in one of the homicides. He told the FCSD that he was willing to be a witness. He also expressed serious reservations about whether he could trust law enforcement in California to help him. Until this conference call, our Office had no knowledge of the 1998 interviews that the FCSD conducted with Mr. Morales.[2]

After receiving the transcripts of these 1998 interviews, we contacted the AUSA who handled Mr. Morales's 1996 case in the EDCA to determine if he knew about the interviews or the information that came out of the interviews. He did not. The AUSA said that sometime after Mr. Morales's sentencing, local law enforcement approached him about whether he would consider a Rule 35 motion for Mr. Morales, and the AUSA made it clear that he would not file such a motion. The AUSA stated that he never heard from local law enforcement again about Mr. Morales.

We also obtained a copy of the file from Mr. Morales's 1996 case from the USAO-EDCA archives. A review of the file confirmed that Mr. Morales did not enter into a cooperation agreement and that no Rule 35 motion was ever filed on his behalf in that case. The transcripts from the FCSD's interviews with Mr. Morales in 1998 were not in the file and the file did not otherwise indicate that the USAO-EDCA knew about the 1998 interviews with the FCSD. A review of the file also revealed the following information:

1. When he was arrested in 1996, Mr. Morales provided a 14-page handwritten statement to the ATF, the law enforcement agency that arrested him, and the ATF agent who received this statement drafted a two-page report of her interview with Mr. Morales. The statement provides a history of the origins of Mr. Morales's gang (the Fresno Bulldogs) and his role in the gang. According to the ATF agent who obtained the statement, Mr. Morales agreed to provide the statement because the agent did not handcuff Mr. Morales in front of his child at the time of arrest.

2. Brief notes regarding a telephone conversation between the AUSA in the EDCA and Mr. Morales's attorney approximately one month after Mr. Morales's arrest in

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[2] The fact that Mr. Morales debriefed was included in the February 23, 2009, letter from Miguel Zaldivar to Paul A. Pelletier, that was previously provided to you. In the trial team's pretrial meetings with Mr. Morales, he explained that he debriefed after his sentencing with a gang unit at a facility in Atlanta, Georgia, and that he was truthful about his own criminal conduct, that he did not name other people involved in the conduct, and did not testify for the government. Before trial began, the government checked the docket sheet in Mr. Morales's 1996 EDCA case, which showed that no Rule 35 motion had been filed in that case, nor was there any indication that Mr. Morales had entered into a cooperation agreement with the government.

1996 include a passage indicating that the attorney represented that Mr. Morales had information about a police shooting and two murders, and wanted to know what the government would do for Mr. Morales. The notes reflect that the AUSA told the attorney that he would not do anything until he knew what Mr. Morales had to say. (When contacted by our Office recently, the AUSA explained that he believed it was in the community's best interest to obtain the longest possible sentence for Mr. Morales. For that reason, he was not interested in following up with Mr. Morales's counsel and, to the best of our knowledge, there were no further communications with Mr. Morales's attorney, or Mr. Morales himself, about any information Mr. Morales might have had. The AUSA did not have any information that would call into question Mr. Morales's credibility or truthfulness.)

3. In a handwritten letter dated approximately one month before he pled guilty in 1997, and addressed to the AUSA in the EDCA, Mr. Morales stated that he could not accept the government's plea offer because it exposed him to a possible life sentence; that he was a defector from his gang; that in 1994, he helped Sheriff's department officials at the local jail better understand his gang; and that he attempted to work with federal law enforcement concerning his case, but this effort did not work out.

The government will make the interview transcripts and other materials described above available for review at our offices at a time that is convenient for you and the government.

Sincerely,

RONALD C. MACHEN JR.
United States Attorney

By: _____
Fernando Campoamor-Sánchez
Assistant United States Attorney

EXHIBIT B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION - FELONY BRANCH

UNITED STATES OF AMERICA	:	**Case No. 2009CF1009230**
	:	
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	:	
INGMAR GUANDIQUE	:	

UNDER SEAL

O R D E R

Upon motion of the government and for good cause shown, it is hereby

ORDERED that the government shall disclose to counsel for the defendant the letter that is attached hereto as Exhibit A. It is further

ORDERED that counsel for the defendant and all members of the "defense team" are prohibited from disclosing the letter or any information contained therein to the defendant or anyone beyond the "defense team." The "defense team" is defined as only the defendant's attorneys and their investigators and does not include the respective defendant or anyone else. It is further

ORDERED that if the defense wishes to review any of the underlying documents referenced in the letter, the government shall make those documents available for inspection at its offices. The defense may not copy the disclosure letter or any of the materials that are made available for review by the government. It is further

ORDERED that, in order to prevent further dissemination of the information, which could create security risks or hinder ongoing investigative efforts, the defense must notify the government and seek permission from the Court before disclosing any information contained in the attached disclosure letter to anyone other than the defense team, including through interviews with any third party. It is further

ORDERED that any statements or other information obtained by the defense team relating to the information being disclosed pursuant to this protective order, including any notes taken or information learned as a result of the review of any related documents, may not be communicated to anyone or shared with anyone other than defense team. It is further

ORDERED that any filings or other submissions by the defense relating to or referencing the information being disclosed by the government pursuant to this protective order must be filed under seal, and all references to the information during any hearings must be made at the bench and under seal. It is further

ORDERED that this Order and the Government's *Ex Parte* Motion for Protective Order and Motion to Seal shall be filed and remain under seal until further order of the Court.

SO ORDERED.

Date

Gerald I. Fisher
Associate Judge

cc:

Amanda Haines
Fernando Campoamor-Sanchez
Christopher Kavanaugh
Assistant United States Attorneys
U.S. Attorney's Office for the District of Columbia
555 4th Street, NW
Washington, D.C. 20530

Santha Sonnenberg, Esq.
Maria Hawilo, Esq.
The Public Defender Service for the District of Columbia
633 Indiana Avenue, N.W.
Washington, D.C. 20004

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
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UNDER SEAL

OPPOSITION TO THE UNITEDS STATES' MOTION TO CLOSE THE DECEMBER 18, 2012 STATUS HEARING

The prosecution of Ingmar Guandique was one of the highest-profile cases in the District of Columbia in decades. The prosecution relied to a large extent on a single witness, Armando Morales, who testified that Mr. Guandique had confessed to him that he killed Chandra Levy. While Morales's checkered history and the fact that he waited over two years to disclose this supposed confession made him a dubious witness, the government offered a story to rehabilitate his testimony: he was a reluctant informant who had previously adhered to a code against "snitching," but who recently had a change of heart. We now know that story was fabricated. In fact, we know that the United States has had much if not all of the information that proved the story was false at its fingertips since before trial began[1]—and the U.S. Attorney's Office for the District of Columbia now acknowledges that it has had that information for at least the past year—yet to this day the government is fighting to keep these facts a secret and now seeks this Court's assistance in hiding the information from public view. That is unconscionable.

Whether the U.S. Attorney's Office was complicit in covering up Morales's lies, or whether it was merely incompetent in failing to learn about its central witness's past cooperation

[1] The information thus far disclosed by the government shows that, prior to Mr. Guandique's trial, the Office of the United States Attorney, the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco, and Firearms, and the Fresno County Sheriff's Department were in possession of information that directly showed Morales's testimony was false.

with federal law enforcement agencies—a fact which ran contrary to the narrative it presented to the jury—is beside the point at this stage. Under either explanation, Mr. Guandique and the public have a right to know precisely what happened at Mr. Guandique's trial and why the government allowed its prosecution to be predicated on a lie.

The United States has not come close to satisfying its burden of demonstrating the strict necessity of closing tomorrow's proceeding. A criminal proceeding can only be closed upon an affirmative showing that (1) there is an overriding government interest that is *likely* to be prejudiced, (2) the proposed disclosure is *no broader than necessary* to protect that interest, (3) there are *no reasonable alternatives* to closing the proceeding, and (4) there is *particularized evidence* supporting the closure. *See Waller v. Georgia*, 467 U.S. 39, 48 (1984). Here, the government offers nothing more than vague allusions to interests in witness security and ongoing investigations being compromised without any particularized showing of how those interests could specifically be threatened by keeping tomorrow's proceedings open. The risks the government has identified are not only vague, but they are run-of-the-mill risks that every witness who testifies against an (alleged) gang member faces, and they are risks that already exist since Morales has already stated in open court that he is willing to testify against allied gang members who have open criminal cases. All of the risks the government has identified here are the result of its own choice to present Morales as a witness in the first place; while it apparently thought it was worth subjecting Morales and his family to these risks for the sake of its own prosecution, it now somehow believes those risks override Mr. Guandique's right to publicly probe the integrity of his trial. The Constitution does not hold the right to a public trial in such low regard.

Even if the government had shown a concrete interest that could be furthered by closing tomorrow's proceedings, any such interest is overridden by the vast public interest in keeping these proceedings open to the public. The Supreme Court has explained that "[u]nderlying the First Amendment right of access to criminal trials," as well as post-trial proceedings, "is the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs.'" *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 604 (1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). Here, both Mr. Guandique and the public have a right to know the details about how the government chose to prosecute its case, what exculpatory evidence it chose not to share with the defense, and what investigation (if any) the government did into its key witnesses, such as Morales. The public and the press will be instrumental in shedding light on the full story behind Mr. Guandique's prosecution, in identifying possible witnesses and evidence for future hearings, and in scrutinizing the selective story that the government continues to present.

Finally, the government's motion is procedurally flawed. The Supreme Court has made it abundantly clear that even in those rare instances where closure might be warranted, "representatives of the press and general public *'must be given an opportunity to be heard on the question of their exclusion.'*" *Globe Newspaper Co.*, 457 U.S. at 609 n.25 (emphasis added) (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (1979) (Powell, J., concurring)). At a bare minimum, this Court must give the public and the press an opportunity to oppose the closure of tomorrow's proceeding—and future proceedings—before it even entertains the government's proposed closure. The motion should be denied in all respects.

BACKGROUND

Armando Morales was a key witness in the prosecution of Ingmar Guandique. Morales specifically claimed to have heard Mr. Guandique confess to killing Chandra Levy in September 2006, but he did not come forward with that information until February 2009, after then-recent publicity linking Mr. Guandique to the Chandra Levy case. A major theme of Morales's testimony was his explanation for the delay: according to him, he lived by a code forbidding him from "snitching," but he had reassessed that code and abandoned it just before coming forward in 2009.[2] Explaining on direct-examination why he did not initially come forward with Mr. Guandique's alleged confession, Morales testified that "I wasn't thinking like that" at the time and "I didn't have it in me to tell at that time." Tr. 11/4/10 A at 55. Further explaining on re-direct examination why he did not come forward initially, he testified: "At that time … I still had a thug mentality, you know, I still subscribed to them false philosophies of you don't tell." *Id*. at 130.

According to Morales, he came forward because of two life-changing events: his participation in the "Skills Program"[3] at USP Coleman and a visit from his family at Christmas-time in 2008. Morales explained that his "mind-set" when he first entered the program "was difficult," but the program changed him "[d]rastically" and "within nine months it made a big difference." *Id*. at 57. In addition, around Christmas of 2008 Morales's family visited him for the first time in 14 years and they discussed "[c]hange" and "forgiveness." *Id*. The "visit with [his] family gave [Morales] a lot of confidence" and he decided to come forward with the

[2] For example, Morales testified on direct that even when he was "jumped" in prison by members of the rival Norteños, he did not inform the prison staff because "[t]hat's telling," and "not something you are supposed to do." Tr. 11/4/10 A at 18.

[3] The Skills program, according to Morales, "teach[es] you coping skills, living skills" and "that your life is a direct result of choices you made" and "how to make … better choices." Tr. 11/4/10 A at 56.

information about Mr. Guandique because he was "comfortable with [him]self." *Id*. at 58, 61. Asked if his life had taken a "180-degree turn" after the Christmas visit from his family, Morales replied "[t]hat's correct." *Id*. at 102. He further explained that he decided to come forward because he "no longer subscribe[d] to those prison philosophies" and did not "seek my other … homeys' approval anymore." *Id*. at 61.

In addition to testifying that he was a changed man who no longer had reservations about informing law enforcement and prosecutors about the criminal activity of others, Morales explained that he was a founding member of the Fresno Bulldogs criminal gang. Tr. 11/4/10 A at 13-14.[4] He shared with the jury a number of details about the Fresno Bulldogs.[5] Morales willingly testified against Mr. Guandique, who he claimed was a "good friend." *Id*. at 38. Mr. Guandique was also in MS-13 according to Morales. *Id*. at 22. Because of Mr. Guandique's membership in MS-13, Morales considered Mr. Guandique an "ally" of Morales and the Fresno Bulldogs. *Id*. at 22, 119.[6]

Morales testified in the widely-publicized trial despite being aware of the danger from his former gang. Morales testified that "by me testifying here, I am putting myself in harm's way. I know back home a lot of people are going to feel that I am wrong." Tr. 11/4/10 A at 129. He further explained that his life in prison would be "more difficult" because he was "telling," and

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[4] According to Morales, he was also a "squad leader" for the Bulldogs and an "emissary" for the Mexican Mafia, as well as "head of security" for the Bulldogs, meaning that it was his "job to engage" in "any violence" that "had to be done[,] like any stabbing[.]" *Id*. at 37.

[5] For example, Morales testified that the Fresno Bulldogs are enemies with another gang, Nuestra Familia Norteños. Tr. 11/4/10 A at 15. He also explained that the San Quentin and Folsom state prisons in California are known as the "headquarters" for the Fresno Bulldogs. *Id*. at 35.

[6] Morales explained that the Fresno Bulldogs are allied with the Sureños and the Mexican Mafia, which he described as the "super gang of all gangs." Tr. 11/4/10 A at 14. He further explained that the Mara Salvatrucha members, also known as MS-13, are "Sureños" under the Mexican Mafia. *Id*.

he would not "be able to be in general population." *Id*. at 130.[7] Not only did Morales willingly testify about an ally gang member, but his testimony made clear that he would consider it a "benefit" to tell the truth about anyone who had committed a homicide and "gotten away with it" by avoiding criminal conviction. During cross-examination, Morales admitted that he was aware of other killings, but claimed that he had not come forward because the culprits in those cases "are already convicted." *Id.* at 103, 130. Indeed, he reiterated that the difference between this case and the others was that Morales did not "think [Mr. Guandique] had been convicted," which mattered to Morales "[b]ecause he got away with it." *Id*. at 131. Morales also testified that the "only benefit" he was receiving for his testimony was "being able to come here and tell the truth." *Id*. at 126.

Mr. Guandique was convicted and sentenced to sixty years imprisonment. Afterward, according to the U.S. Attorney's Office for the District of Columbia Office's representations, its particular office learned of information that drastically undercut its prosecution of Mr. Guandique about a year ago.[8] Specifically, the government learned that Morales was not a reluctant informant who had only recently disavowed a code against snitching, but instead was a man who had an extensive history of trying to strike deals with federal authorities in exchange for his cooperation in ongoing investigations. Nonetheless, the government kept this information to itself for the better part of a year, before finally sending an ex parte letter to this Court on November 13, 2012, which "described" the information to the Court, "outlined … witness

[7] Morales explained that he "defected from the gang" in 1996. Tr. 11/4/10 A at 16. Prior to his testimony, the fact that he defected from the gang was not known in the prison system because it was "not something [Morales] wanted everybody to know." *Id*. at 16-17. Indeed, he testified that he "hid [the] fact" of his defection from the gang and that it was "not something [he] wanted anybody to know." *Id*. at 53.

[8] The government has not given a specific date that it learned of this information, other than to state that it was "[a]pproximately one year after sentencing[.]" *See* Gov't Motion to Seal Hearing ("Mot.") at 3.

security concerns," and "sought guidance from the Court regarding whether the information should be disclosed to the defense." Gov't Ex Parte Motion for Protective Order at 1. To the best of counsel's knowledge, that letter has not been made a part of the record in this case.[9]

On November 30, 2012, Mr. Guandique's counsel was informed for the first time that a hearing was set in this case for December 14, 2012. Counsel was not informed of the nature of the hearing but was told by the Court that the United States Attorney's Office would contact counsel "with more details about the hearing." On that date, Assistant U.S. Attorney Alessio Evangelista left a voicemail which disclosed the need to talk about "something" about the case. The next day, AUSA Evangelista informed counsel that the government had "significant impeaching" information regarding one of the government's witnesses at trial, but would not disclose further details until counsel agreed to a temporary protective order. The following day, December 2, counsel agreed to a temporary protective order but the information was still not disclosed. On December 4, counsel filed a motion for an immediate hearing. Later on December 4, the government finally provided counsel with a letter containing the government's summary of the information.[10] On December 12 counsel was provided with the opportunity to view some, but not all, of the documents referenced in the government's letter. Two lawyers and one investigator spent approximately five hours reviewing the documents and taking longhand notes regarding their content because the government refused to provide counsel with copies of the documents.

[9] Counsel has requested a copy of the ex parte letter, but the government refused to provide it to defense counsel despite claiming that it contains the same information that was provided in the government's subsequent letter to counsel.

[10] The government's Motion to Seal the Hearing incorrectly states that counsel was provided the letter on November 21, 2012.

On December 5, 2012, a conference call between the Court, defense counsel, and the U.S. Attorney's Office took place during which a hearing was set on the matter for December 18, 2012. The temporary protective order, and a clarifying email sent from the Court on December 6, 2012, have prevented counsel from informing Mr. Guandique not only about the disclosure made by the government, but also from disclosing to him the very existence of a hearing on December 18. When counsel last checked the existence of the hearing has not been made public on Court View. The government now seeks an order from this Court extending the secrecy concerning its conduct in this high-profile prosecution.

ARGUMENT

I. THE GOVERNMENT HAS FAILED TO MAKE THE PARTICULARIZED SHOWING OF A STRICT AND INESCAPABLE NECESSITY OF CLOSING TOMORROW'S PROCEEDINGS.

The government has fallen far short of demonstrating the "strict and inescapable necessity" of closing tomorrow's proceedings, *Tinsley v. United States*, 868 A.2d 867, 874 (D.C. 2005), and its motion should be rejected. "The power to close a courtroom where proceedings are being conducted during the course of a criminal prosecution ... is one to be very seldom exercised, and even then only with the greatest caution, under urgent circumstances, and for very clear and apparent reasons." *United States v. Cojab*, 996 F.2d 1404, 1405 (2d Cir. 1993).

Here, in support of its motion to close the proceedings, the government has offered nothing but conclusory and vague assertions that some unknown individuals have made some non-specific comments to some unidentified members of Morales's family. Moreover, the implication of its filing is that proceedings should be closed indefinitely, as it offers no timetable during which the vague threats it identifies might be mitigated. It offers no support for such an indefinite closure. The most specific threats the government has identified to date are:

- "Comments have been made to some of the witness's family members about the fact that they are related to the witness and that the witness is a 'snitch.'"
- "These comments were followed by derogatory comments toward the family members in an attempt to provoke confrontations."
- "[A] family member was told that a member of the Bulldogs is due to be released from prison, and the witness is concerned that … there will be violent repercussions to his family."

Mot. at 3. These non-descript statements are inadequate to support the closure of a criminal proceeding. As the Supreme Court has made clear, if a court asserts that there is an overriding interest sufficient to close proceedings, that "interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press–Enterprise II*, 478 U.S. at 9-10 (quoting *Press–Enterprise I*, 464 U.S. at 510). Here, the government's allegations are so non-specific that there is no way of evaluating the actual risk that it now purports overrides Mr. Guandique's and the public's right to public criminal proceedings, and there is no way for this Court to make the specific finding of necessity required before it can close proceedings.

Moreover, the few vague threats the government does identify resulted from its own decision to use Morales as a witness in its prosecution. Any reason to retaliate against Morales for testifying against a fellow (alleged) gang member—speculative though it may be—already exists as a result of that decision, regardless of anything that might come out in future proceedings. Morales's prior public testimony in Mr. Guandique's case established the following: (1) Morales is willing to testify against somebody he considered to be a good friend, (2) Morales is willing to testify against members of allied gangs, (3) Morales is willing to testify about the inner workings of the Fresno Bulldogs, and (4) Morales would testify in the future about crimes he has witnessed if the perpetrator has yet to be convicted. In other words, every possible incentive somebody might have to seek retribution against Morales is already a matter

of public record. The government was unfazed by the security risks to Morales and his family when it chose to present him as their key witness in a highly publicized trial,[11] and it is audacious for it to now suggest that the security risks it created warrant dispatching with Mr. Guandique's right to publicly probe the integrity of his trial. In fact, if Morales had simply been honest on the stand rather than perjuring himself, then his past history of cooperating with the federal government would already be a matter of public record. The government now asks this Court to give Morales further benefits from his own perjury.

Morales's testimony in this highly publicized trial makes clear that the new information creates no additional danger to Morales. The Fresno Bulldogs have been fully aware since 2010 that Morales was willing to testify against "good friends," even fellow gang members, who had "gotten away with" their crimes. The government's disclosures thus far appear to suggest, without explicitly stating, that Morales remains in the custody of the Bureau of Prisons under a pseudonym and in the BOP witness protection program. If Morales is in the BOP system, certainly they can continue to protect him in the same way that they have since 2010. The government claims that Mr. Guandique has an incentive to "seek revenge" against Morales by disclosing the information to other gang members and suggests he has little to lose by doing so because he is serving 60 years in jail. Notably, the government does not claim to have any proof that Mr. Guandique has sought to retaliate against Morales in the two years since he testified. Furthermore, Mr. Guandique would have much to lose: Morales is now a very important witness regarding Mr. Guandique's post-trial proceedings, as he can shed light on what the government knew about his perjury and untruthfulness, and when the government knew that information.

[11] The government cannot seriously assert that it could not foresee that some people might view Morales as a "snitch" after his testimony, which is effectively the entirety of the "fallout" that they now allege has occurred. Mot. at 4.

If the speculative threat of retaliation against a prosecution witness that the government offers here were sufficient to close criminal proceedings to the public, then trial proceedings would routinely be closed here in the District of Columbia, and across the country. Thankfully, the constitutional right to a public trial is not so easily discarded. A far greater showing must be made before criminal proceedings can be closed to the public or—as the government proposes here—to the defendant himself. Specifically, there must be concrete, specific, and realistic threats against a particular witness before a criminal proceeding will be closed. *Lancaster v. State*, 978 A.2d 717 (Md. 2009) (reversing trial court's closure "where the State failed to present any evidence regarding 'specific threats' from Lancaster, his brother, or their associates against the witnesses."). Even then, the closure should be short in duration, and typically only extends until such time as the threatened witness has an opportunity to testify. *See Morgan v. Bennett*, 204 F.3d 360, 364 (2d Cir. 2000) (protective order appropriate where defendant would not learn of witness's identity until day of testimony); *see also Kleinbart v. United States*, 388 A.2d 878, 883 (D.C. 1978) ("[W]e hold that it is only under the most exceptional circumstances that limited portions of a criminal trial may be closed even partially to the public.")

The flaws in the government's motion are magnified by contrasting this case to *Tinsley*, the case the government primarily relies upon in support of closure. 868 A.2d 867. In *Tinsley*, the trial court partially closed proceedings only to the defendant's brother and some of his friends for the duration of a single witness's testimony. Before closing the proceedings to even that limited extent, the court heard testimony from the witness that "a friend of [defendant]'s brother had stabbed her and told her she would not 'make it to court,'" and that "prior to trial several unknown persons had broken into her apartment, attacked her, stabbed her in the arm, and told her not to testify against Tinsley." *Id.* at 871-72. Even in the face of a concrete and

specific incident of the witness being stabbed to preclude her from testifying, the Court of appeals found it critical that "the [closure] order was intended to last only for the duration of [the witness's] testimony," *id.* at 878, and no longer. Here, unlike in *Tinsley*, the government has offered nothing to substantiate its vague claims that some non-descript and derogatory comments have been made to Morales's family; additionally, unlike the brief and limited closure directed in *Tinsley*, the government's motion at least suggests that closure be indefinite. It is an unprecedented, and unsupported, request.[12]

Finally, the government has suggested that there may not be a right to public proceedings after the conclusion of trial. Mot. at 7. That suggestion is unfounded. The right to a public trial extends to post-trial proceedings, as the Federal Circuit Courts of Appeals have uniformly found. *See, e.g., United States v. Simone*, 14 F.3d 833, 839-40 (3d Cir. 1994) ("[T]he First Amendment right of access attaches to post-trial hearings to investigate jury misconduct."); *In re Washington Post Co.*, 807 F.3d 383, 389 (4th Cir. 1986) (right of public access applies to sentencing hearings); *CBS, Inc. v. U.S. Dist. Court for Cent. Dist. of Calif.*, 765 F.2d 823, 825 (9th Cir. 1985) (right to public trial extends to Rule 35 motion to reduce sentence hearing). The Supreme Court has made it abundantly clear that both the First and Sixth Amendment rights to a public

[12] Aside from security interests, the government asserts that ongoing investigations could be jeopardized by opening these proceedings. In both cases, the Fresno County Sheriff's Department has known that Morales was willing to testify since 1998. They have also known since 1998 that Morales claimed [redacted] one of the murders and was willing to provide the name of the other participant. Thus far the government has not explained why "local law enforcement did not follow up with [Morales]" or why "the two homicides have not been prosecuted." Mot. at 3. To demonstrate that these "ongoing investigations" are important enough to hold secret proceedings in this case, the government must first explain why they have been on hold for fourteen years. Furthermore, it is odd that the government would be relying on Morales's importance to those prosecutions, since it is now asserting that his cooperation in those cases must never be made public because it would jeopardize him and his family. If Morales is expected to participate as a witness in either of those cases—which will be public criminal trials—that fact obliterates the government's alleged interest in keeping Morales's prior statements from the public.

trial extend beyond the actual bounds of trial. *See Waller v. Georgia*, 467 U.S. 39, 45 (1984) (defendant's Sixth Amendment right extends to pretrial suppression hearings); *Press Enterprise Co. v. Superior Court of Cal.*, 478 U.S. 1, 6 (1986) (*Press-Enterprise II)* (public's First Amendment right extends to preliminary hearings).

While those two Supreme Court cases happened to involve pretrial proceedings, the Supreme Court's reasoning was in no way limited to pretrial hearings, rather, the Supreme Court's reasoning was that "the First Amendment question cannot be resolved solely on the label we give the event, i.e., 'trial' or otherwise." *Press-Enterprise II*, 478 U.S. at 7; *see also Press Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 516 (1984) (*Press-Enterprise I*) (Stevens, J., concurring) ("[T]he distinction between trials and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues."). Rather, the question is "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 478 U.S. at 8. Here, there should be no doubt that this proceeding—concerning the integrity of a criminal prosecution—lies at the heart of what the constitutional right to a public trial was meant to protect. *See Globe Newspaper Co.*, 457 U.S. at 606 ("[I]n the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.").

As then-Judge Anthony M. Kennedy explained when writing for the Ninth Circuit, there is "no principled basis for affording greater confidentiality to post-trial documents and proceedings than is given to pretrial matters." *See, e.g., CBS, Inc.* 765 F.2d at 825 (concerning Rule 35 motion to reduce sentence hearing). "The primary justifications for access to criminal proceedings—first that criminal trials historically have been open to the press and to the public,

and, second, that access to criminal trials plays a significant role in the functioning of the judicial process and the governmental system—apply with as much force to the post-conviction proceedings as to the trial itself." *Id.* at 825. Consistent with this logic, there are dozens of cases extending the public trial right to post-trial proceedings, yet the government has not identified a single case where a court found the right to a public trial ceases once sentencing has concluded, and counsel for Mr. Guandique is not aware of any such cases. If such cases do exist, they run afoul of the Supreme Court's reasoning in *Waller* and *Press-Enterprise I* and *II*.

II. EVEN IF THE GOVERNMENT COULD SATISFY ITS BURDEN OF SHOWING AN OVERRIDING INTEREST IN CLOSING PROCEEDINGS, THAT INTEREST MUST GIVE WAY HERE, WHERE OPEN PROCEEDINGS ARE ESSENTIAL TO A FAIR DETERMINATION OF THIS MATTER.

At the heart of any closure motion is weighing the defendant's and public's interest in open proceedings against the asserted "overriding interest" in closure. While Mr. Guandique contends in Point I that the governmental interest asserted here is so vague and non-specific that it would never warrant closing any part of a proceeding, even if that were not true the intense public interest in this particular proceeding severely outweighs the government's articulated interest. As the Supreme Court has explained, "[t]he press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966). The Supreme Court "has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media, for what transpires in the court room is public property.'" *Id.* at 350 (quoting *Craig v. Harney*, 331 U.S. 367 (1947)). "[O]penness of a proceeding also promotes more accurate fact-finding, either because witnesses are more hesitant to commit perjury in a proceeding open to the public, or because 'key

witnesses unknown to the parties' may learn about a trial if it is public." *Richmond Newspapers Inc.*, 448 U.S. at 596-97. These public interests are at their apex in these post-trial proceedings, where the government's conduct in prosecuting one of the District of Columbia's most closely watched cases in decades will come under intense scrutiny, as will the integrity of the government's conduct in these proceedings themselves.

This case is strikingly similar to the prosecution of Senator Ted Stevens, another high-profile case in which the government failed to disclose key impeachment evidence and a previously obtained conviction was ultimately set aside. In post-trial proceedings in that case, "the government filed a 'Sealed Memorandum' … [which] notified the Court that the government's attorneys … had received a copy of a 'self-styled whistleblower complaint'" that the government determined to be exculpatory and wanted to keep under seal. *See United States v. Stevens*, No. 08-231, 2008 WL 8743218 at *2 (D.D.C. Dec. 19, 2009). The defense opposed the motion to seal, stressing the "important constitutional rights at issue and that the defendant cannot adequately address the allegations in the complaint and any impact on the verdicts in this case unless the complaint and any proceedings that result from this complaint are open to the public." *Id.* at *3.

Judge Emmet Sullivan had no difficulty ordering disclosure of the material and stressed the high profile nature of the case and the intense public interests at stake. Judge Sullivan first summarily rejected the government's half-hearted argument that the public trial right does not extend to post-trial proceedings, finding that the post-trial proceedings in that case—implicating the same *Brady* and *Giglio* concerns that will be raised in this case—concern "the conduct of police and prosecutor in a highly publicized trial and addresses many of the very same issues of misconduct that were raised during that trial." *Id.* at *7. The court concluded "that under the

reasoning of *Waller*, the defendant has a Sixth Amendment right and the public has a First Amendment right to disclosure of the [whistleblower] complaint," regardless of the fact that it only came about post-trial. *Id.*

Next, the Court rejected the government's contention that there were overriding interests favoring closure, such as protecting the whistleblower and incentivizing future whistleblowers. Once again, the court had little difficulty rejecting the government's assertions, with reasoning that is fully applicable here:

> While the Court recognizes the competing interests at issue and the sensitive nature of the information, it cannot be said that these interests represent "higher values" than the defendant's and the public's rights previously discussed. The complainant and the individuals named in the complaint may have legitimate and significant privacy interests and due process rights at stake, but those rights and interests do not trump the defendant's rights under these circumstances to challenge his conviction with exculpatory evidence provided in the complaint. This is especially true where the complainant and the named individuals are not strangers to these proceedings, but rather were significantly involved in the investigation and prosecution of the defendant.

Id. at 8; *id.* at *11 ("To seal the complaint would be to deprive the public of information that directly addresses courtroom conduct, documents that were introduced at trial, and information that was relied upon by the Court for various decisions throughout the proceedings.").

The same reasoning applies here. These post-trial proceedings will ultimately focus on the integrity of Mr. Guandique's trial, and there is an overwhelming public interest in learning about what happened. The issues will concern possible *Brady*, *Giglio*, and *Napue* violations, and the public's interest in scrutinizing government officials who may have engaged in any such violations is enormous. *See generally Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959). "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power...." *Richmond Newspapers*, 448 U.S. at 596. As

explained above, the public was deprived of that contemporaneous review because the government predicated its entire case on a falsehood, regardless of whether the particular office prosecuting the case was aware or ignorant of that fact; the only remedy is to bring the extraordinary closure of these proceedings to an immediate end. Further delay is unwarranted.

III. THE GOVERNMENT'S CLOSURE MOTION IS PROCEDURALLY FLAWED, AS THE PUBLIC HAS A RIGHT TO NOTICE OF ANY CLOSURE MOTION SO THAT THEY MAY OPPOSE IT.

Beyond the government's failure to make the substantive showing required to close tomorrow's proceedings, its request to close proceedings suffers from two insurmountable procedural flaws as well. The Supreme Court has made clear that before closing a court proceeding, the court must satisfy two procedural requirements: (1) the court must "give public notice of contemplated closure of the proceeding," and (2) "'the press and general public must be given an opportunity to be heard on the question of their exclusion.'" *In re Hearst Newspapers, LLC*, 641 F.3d 168, 181-82 (5th Cir. 2011) (quoting *Globe Newspaper Co.*, 457 U.S. at 609, n. 25). The Federal Courts of Appeals have strictly and uniformly enforced this public notice requirement. *See, e.g., United States v. Alcantara,* 396 F.3d 189, 200 (3d Cir. 2005) ("[A] motion for courtroom closure should be docketed in the public docket files.... Entries on the docket should be made promptly, normally on the day the pertinent event occurs."); *Phoenix Newspapers, Inc. v. U.S. Dist. Ct.,* 156 F.3d 940, 949 (9th Cir.1998) ("[I]f a court contemplates sealing a document or transcript, it must provide sufficient notice to the public and press to afford them the opportunity to object or offer alternatives."); *Oregonian Publ'g Co. v. U.S. Dist. Ct.,*920 F.2d 1462, 1466 (9th Cir. 1990) ("those excluded from the proceeding must be afforded a reasonable opportunity to state their objections"); *In re Washington Post Co.,* 807 F.2d 383, 390–91 (4th Cir. 1986); *United States v. Valenti,* 987 F.2d 708, 713 (11th Cir.1993) ("notice and

an opportunity to be heard on a proposed closure" is required prior to closing a "historically open process where public access plays a significant role"); *Washington Post v. Robinson*, 935 F.2d 282, 289 (D.C. Cir. 1991) (before a plea agreement is sealed, "The trial court must promptly allow interested persons an opportunity to be heard before ruling on the motion and entering the sealing order").

Under this overwhelming case law, this Court should not even entertain the government's motion until the press and public have had a right to comment. The Fifth Circuit's recent opinion in *In re Hearst Newspapers* exemplifies the importance of providing notice sufficient to allow the public to oppose closure of criminal proceedings. That case concerned the trial of a former leader of the Gulf Cartel, who the United States government described as "one of the most wanted, feared, and violent drug traffickers in the world and was widely believed to be partly responsible for the ongoing drug trafficking wars and 'bloodbaths' along the Mexican border, resulting in the deaths of approximately 2000 persons … [and he] reportedly continued to coordinate the activities of his organization from jail." 641 F.3d at 172. In that case, the government contended that "holding a preclosure hearing would have endangered [the defendant], the courthouse and United States Marshals Service personnel, and members of the public in the courthouse, because of the possibility of an attack on the courthouse due to [defendant's] presence during such a hearing." *Id.* at 185. The Court of Appeals found that *the threat of an attack on the courthouse and its personnel* was not sufficient to justify forgoing a public hearing on the issue of closure. *Id.* There should thus be no doubt that the vague and unverified statements allegedly made to Morales's family are not of sufficient gravity to continue to keep the public in the dark about these proceedings. The public has a right to be heard if it is going to be further excluded from these proceedings.

IV. EVEN IF CLOSING THE PROCEEDINGS TO THE PUBLIC WERE WARRANTED, MR. GUANDIQUE HAS A RIGHT TO KNOW THE NEW INFORMATION AS IT IS CRITICAL TO HIS DEFENSE AND APPEAL.

Finally, the government has offered absolutely no support for excluding Mr. Guandique from the proceedings transpiring in his own case. There are a handful of cases where trial courts have issued protective orders precluding informing a defendant about the identity of witnesses until immediately before they testify, but only where the defendant or his agents have specifically threatened the witness in question. *See, e.g.*, *Alvarado v. Superior Ct.*, 23 Cal. 4th 1121, 1136 (2000) (order withholding identification of three eye-witnesses prior to trial was proper, but order that extended throughout trial was improper). However, there is no precedent that would permit an order indefinitely keeping Mr. Guandique from learning about the basis of these proceedings, which will likely lead to evidentiary hearings and/or serve as the basis of Mr. Guandique's appeal. While the government speculates that Mr. Guandique could be out for revenge if he learns about this new information, any such incentive has been in place for Mr. Guandique for years, since Morales provided false testimony against him.[13]

Where there is not a specific threat against a witness originating from the defendant, there is simply no basis to keep him in the dark about information pertinent to his case. *See Lancaster v. State*, 978 A.2d 717 (Md. 2009) (reversing limited closure of proceedings where "the State failed to present any evidence regarding 'specific threats' from Lancaster, his brother, or their associates against the witnesses.").

[13] Morales is presumably in the custody of the Bureau of Prisons—although Mr. Guandique does not even know that much—where he has been kept safe from any of the vague threats against him for years. The government has provided no reason to believe that the previous measures it has taken to keep Morales safe would somehow be ineffective against further disclosure of Morales's past as a cooperating witness.

CONCLUSION

The government's motion to close tomorrow's proceedings should be denied. Additionally, all future proceedings should remain open to the public and Mr. Guandique.

Respectfully submitted,

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

UNITED STATES OF AMERICA	*	
	*	**Case No. 2009-CF1-9230**
v.	*	**J. Fisher**
	*	**Closed Case**
INGMAR GUANDIQUE	*	

UNDER SEAL

UNITED STATES' MOTION TO SEAL THE DECEMBER 18, 2012 STATUS HEARING

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully files this Motion to Seal the December 18, 2012 Status Hearing.

OVERVIEW

As discussed below, the purpose of the December 18, 2012 status hearing is to discuss the United States' request for a Protective Order governing the disclosure and use of information about a government witness that was learned after sentencing in this matter. Because disclosure of the new information would pose a serious risk to the safety of the witness and his family (who already have experienced disturbing comments and events as a result of his testimony in this case), because disclosure likely would threaten the integrity of two homicide investigations in another jurisdiction, because any meaningful discussion about the appropriate parameters of the Protective Order will necessarily also involve a discussion of the information that poses a threat to the safety of the witness and his family and the ongoing investigations, and because any public notice of the hearing will prompt intense press coverage and speculation, thereby increasing the likelihood that the information at issue will be disclosed and the security of the witness and his

family compromised, we ask that the Court seal the hearing. We also ask that, at the conclusion of the hearing, the Court enter an order under seal that articulates the security concerns to the witness and his family and the need to maintain the integrity of the homicide investigations that necessitated sealing the hearing.

BACKGROUND

This case arises from the murder of Chandra Levy on May 1, 2001. In 2010, the defendant was found guilty of first degree felony murder (kidnapping) and first degree felony murder (attempted robbery) following a jury trial. On February 11, 2011, the Court sentenced the defendant to concurrent terms of imprisonment of 60 years. Every aspect of this case has garnered intense press coverage and speculation.

As the Court and the defense know from trial, one of the government's witnesses in this case was a former high ranking member of a violent gang known as the Fresno Bulldogs. The gang operates in Central California and in the state and federal prison systems. The Bulldogs have been affiliated with other powerful, violent criminal gangs, including the Mexican Mafia and La Nuestra Familia. In addition, the defendant is a member of MS-13, a powerful and violent gang that shares common enemies with the Bulldogs.

After the witness testified in the instant case, he was placed in the Bureau of Prisons witness security program. Disturbing statements and events have followed as a consequence of his testimony in this case. The witness's brother, who is a gang member, denounced the witness for testifying and made it known in the gang community that the witness should not have "snitched." Comments have been made to some of the witness's family members about the fact that they are related to the witness and that the witness is a "snitch." These comments were followed by derogatory comments toward the family members in an attempt to provoke

confrontations. In addition, a family member was told that a member of the Bulldogs is due to be released from prison, and the witness is concerned that as high ranking members of his former gang are released, there will be violent repercussions to his family.

Approximately one year after sentencing, our Office was contacted by the United States Attorney's Office in Fresno, California, in the Eastern District of California, at the behest of the local police department concerning the whereabouts of this witness.[1] Following this contact, our Office learned new information regarding the witness's contacts in the 1990's with law enforcement. The information, which was not previously known by our Office, includes the fact that in 1996, after he was arrested in the Eastern District of California on federal narcotics and gun charges, he gave a statement to the ATF (the law enforcement agency that arrested him) about the origins of the Fresno Bulldogs. We also learned that in 1998, after he had pled guilty and been sentenced in his Eastern District of California case, the witness was interviewed by local law enforcement officers from California about two murders that occurred in California before his incarceration. The witness gave detailed information about these crimes, including the fact that one of these murders was committed by [redacted]. The witness did not provide the name of the Fresno Bulldog gang member who committed the murder, but he expressed a willingness to be a witness. It is our understanding that local law enforcement did not follow up with the witness and that these two homicides have not been prosecuted.[2]

The fact that the witness gave information to law enforcement about two homicides was not previously known by our Office or, to our knowledge, by members of the witness's former gang or other gangs. Moreover, our Office did not know that the witness had given a statement

[1] After the witness was placed in [redacted], our Office was made the point of contact for him.

[2] The homicides currently are under investigation by law enforcement in California.

to the ATF in 1996 about the origins of the Fresno Bulldogs and we believe that the fact that he had given such a statement was not generally known.

The disclosure of this new information creates a serious risk of harm to the witness and his family beyond what they currently face as a result of his testimony. [redacted] Because the Fresno Bulldogs are active in California state institutions and federal BOP facilities and because they are affiliated with other violent gangs, the witness's [redacted] As discussed above, the witness and his family already have experienced disturbing fallout from his decision to testify against the defendant in this case. Public disclosure of the newly learned information about the witness would place the witness and his family at an increased risk of harm.

Moreover, the specific nature of the new information further heightens the risk to the safety of the witness and his family. This information – and particularly the information that the witness offered to identify [redacted] as the culprit in a murder – puts the witness into an entirely different risk category altogether. The potential that Fresno Bulldog members and other gang members would learn or even hear a rumor that the witness had offered to give information and be a witness against [redacted] has caused the witness to be extremely concerned for his own safety and his family members.

The risk of harm to the witness and his family is further aggravated by the fact that the defendant has every reason to seek revenge against the witness. From the perspective of the

defendant, the witness was his friend and advisor of sorts with whom the defendant shared sensitive information, which the witness later publicly revealed. Although the witness's testimony about what the defendant told him about murdering the victim was only one piece of the government's proof at trial, the defendant likely blames the witness for his conviction and for the fact that the defendant is serving 60 years in jail. Given that defendant essentially is serving a life sentence, the threat of additional punishment will not serve to deter him from seeking revenge against the witness. And it would be easy for defendant, an MS-13 gang member, to do so by telling fellow gang members the new information at issue here. Because the Bulldogs and MS-13 are not enemy gangs "at war" with one another and, in fact, share common enemies, word that the witness offered to give information about a gang member most probably would travel beyond the MS-13 circle and likely would include the Bulldogs.

In an ex parte letter dated November 13, 2012, our Office disclosed the new information about the witness's contacts with law enforcement in the 1990's to the Court and provided the Court with documents relating to this information. On November 16, 2012, the Court directed us to disclose the information to the defense and indicated that it would enter a protective order governing the further disclosure of the information. We then provided the Court with an Ex Parte Motion for Protective Order governing the disclosure of the information newly learned about the witness and a Motion to Seal the Ex Parte Motion for Protective Order. On November 21, 2012, we provided to defense counsel a letter disclosing this newly discovered information along with copies of the Ex Parte Motion and Motion to Seal. The December 18, 2012 status hearing then was set to discuss the government's proposed Protective Order, and the defense agreed to be bound by the proposed Protective Order until that date.

On December 12, 2012, the parties met and the government provided for review to defense counsel and their investigator two sets of the underlying documents relating to the new information learned about the witness. The parties also discussed the parameters of the Protective Order. More particularly, the government asked whether there were any portions of the Protective Order that defense counsel would not contest and whether any changes to the Protective Order could be made that were mutually agreeable to the parties. The government has received no response. The government also asked if defense counsel would oppose sealing the December 18, 2012 hearing and counsel stated that they would oppose.[3]

ARGUMENT

The United States now requests that the Court conduct the December 18, 2012 status hearing under seal. Because of the disturbing fallout that has resulted from the witness's testimony in this case, because of the real risk of reprisal against the witness and his family if the information that we have disclosed to the defense and to the Court becomes public, because of the substantial likelihood that public disclosure will jeopardize two ongoing homicide investigations, and because any notice of a public hearing in this matter will trigger intense press coverage and speculation, thereby making the disclosure of the information more likely, we strongly urge the Court to grant this motion and conduct the hearing under seal. At the conclusion of the hearing, the Court should enter an Order under seal that articulates the specific security concerns to the witness and his family that necessitated sealing the hearing.

I. Legal Principles

In the trial context, a defendant has a Sixth Amendment right to a public trial. U.S. Const. amend. VI. ("[i]n all criminal prosecutions, the accused shall enjoy the right to a ... public trial"). Here, of course, defendant's trial has concluded. Neither the Supreme Court nor the D.C.

[3] Defense counsel spent 4 to 5 hours reviewing the two sets of documents that were provided to them.

Court of Appeals has ruled on the issue of whether a defendant who has been tried and sentenced has a Sixth Amendment right to a public court proceeding. In other contexts, however, the law is clear that a defendant does not have the Sixth Amendment rights in post-trial proceedings that he or she had in a trial setting. See Coleman v. Thompson, 501 U.S. 722, 752 (1991) (no Sixth Amendment right to counsel in state post-conviction proceedings); Lee v. United States, 597 A.2d 1333, 1334 (D.C. 1991) (no Sixth Amendment right to counsel in the filing of a § 23–110 motion), overruled on other grounds, Williams v. United States, 783 A.2d 598, 604 n.8 (D.C.2001) (en banc); see also Morrissey v. Brewer, 408 U.S. 471, 480 (1972) (stating that "[t]he revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations"). It is thus unclear, to say the least, that defendant may now avail himself of a Sixth Amendment trial right.

Nonetheless, assuming for the sake of argument that the Sixth Amendment applies here, a defendant's right to a public trial is not absolute. "Important as it is, '[t]he right to a public trial is not absolute.'" Tinsley v. United States, 868 A.2d 867, 874 (D.C. 2005) (quoting Kleinbart v. United State, 388 A.2d 878, 882 (D.C. 1978)). Accordingly, "there are exceptions to this general rule." Presley v. Georgia, 130 S. Ct. 721, 724 (2010) (holding that the Sixth Amendment right to a public trial includes the voir dire process). More specifically, the general right to a public trial "may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." Waller v. Georgia, 467 U.S. 39, 45 (1984) (holding that the Sixth Amendment right to a public trial includes pretrial suppression hearings). "Such circumstances will be rare, however, and the balance of interests must be struck with special care.'" Id. Before the public may be excluded from trial, four conditions must be met: "[1] the party seeking to close the hearing must advance

an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure." Id. at 48 (citing Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) ("Press-Enterprise I")); accord Presley, 130 S. Ct. at 724. "The Waller criteria require the trial judge, in the first instance, to make a number of contextual, fact-specific judgments. Inasmuch as these judgments involve the mid-trial assessment of competing interests, risks and benefits, and alternative remedies, they are committed to the judge's informed discretion." Tinsley, 868 A.2d at 875.[4]

With respect to the first Waller factor, the Court of Appeals has long recognized that witness security issues constitute "an overriding interest":

> Past decisions of this court have recognized protection of witnesses and avoidance of intimidation to be overriding interests that may justify the closure of a criminal proceeding. In Kleinbart, for instance, we specifically identified 'protecting the security of a witness' as an interest 'justifying exclusion of some or all of the public from limited portions of the trial proceedings." 388 A.2d at 882. More recently, in McClinton v. United States, we held it permissible for the trial judge to clear the courtroom temporarily 'to avoid [the] intimidation of [a] witness' who was demonstrably frightened by the spectators. 817 A.2d 844, 860 (D.C. 2003) [footnote omitted]. Other courts have reached similar conclusions. See, e.g., Woods [v. Kuhlman, 977 F.2d 74, 77 (2d Cir. 1992)]... ("[P]rotection of a witness who claims to be frightened as a result of perceived threats meets both the 'substantial reason' and the 'overriding interest' standards."); United States v. Sherlock, 962 F.3d 1349, 1356 (9th Cir. 1989) (citing cases).

Tinsley, 868 A.2d at 875 (upholding the trial court's decision to remove the defendant's family from the courtroom based on government proffer that a reluctant witness, visibly upset during

[4] The test in Waller, a Sixth Amendment case, was drawn from Press-Enterprise I, a First Amendment right of access case. "[T]he extent to which the First and Sixth Amendment public trial rights are coextensive is an open question." Presley, 130 S. Ct. at 724. Nonetheless, the arguments that follow regarding the Waller factors apply equally in the First Amendment context. See generally In re Jury Questionnaires, 37 A.3d 879, 887 (D.C. 2012) ("[t]he Press-Enterprise I procedures call for the exercise of sound discretion by the court to minimize the risk of unnecessary closure by ensuring that there exists a valid basis for concluding that disclosure will infringe a significant privacy interest") (internal quotation marks omitted).

her testimony, had been attacked before the trial by people whom she associated with the defendant and that she was frightened by defendant's family in the courtroom) (emphasis added); see also Presley, 130 S. Ct. at 725 (stating that"[t]here are no doubt circumstances where a judge could conclude that threats of improper communications with jurors or safety concerns are concrete enough to warrant closing voir dire"); McIntosh v. United States, 933 A.2d 370 (D.C. 2007) (noting generally that the right to a public trial "has been limited in particular cases to enable the court to maintain order in the courtroom, to protect witnesses or parties, or to preserve confidentiality").

Here, as a result of his testimony against the defendant in this case, the witness and his family already have experienced disturbing comments and provoking behavior. If it becomes known that the witness spoke with the ATF about his gang and with California state law enforcement about two homicides and gave information that one of the homicides was committed by [redacted] the witness and his family (both those who [redacted] will be in danger. Moreover, the defendant is a member of MS-13, a notoriously dangerous gang. From his perspective, he has every reason to seek revenge against the witness by disclosing the information at issue here to other gang members. Because the Fresno Bulldogs and MS-13 are not enemies and, indeed, share common enemies, the information about the witness likely would travel beyond MS-13 members and into wider gang circles, including the Bulldogs. Defendant, who is serving a 60 year sentence, will be undeterred by the threat of any additional punishment that might follow from his disclosure of this information. In sum, the dangerous situation confronting this witness and his family is precisely the type of "overriding interest" that merits shielding the proceeding from public view. Similarly, the information at issue relates in part to two homicides in California; these murders

are under investigation and thus there is also an "overriding interest" in maintaining the integrity of these investigations.

The second and third factors under Waller require that the Court close the courtroom to the degree necessary to protect the overriding interest at issue and that the Court consider reasonable alternatives to closing the proceeding. Consideration of these factors based on the specific circumstances of this case and the information at issue counsels in favor of sealing the hearing in its entirety. Allowing a discussion on the record of the issues relating to the Protective Order will make it impossible for the parties or the Court to speak meaningfully about the safety risks that confront the witness and his family and the need to protect the integrity of the homicide investigations without compromising the investigations and putting the witness and his family at risk – the very results that the Protective Order are intended to guard against. Moreover, closing only a portion of the proceedings is not a reasonable alternative because it will not work to protect the overriding interests at stake. This case – from the earliest stages of investigation on - has generated an intense degree of press interest and speculation. The witness and his family already have experienced disturbing comments and provoking acts as a result of his testimony and the defendant already has a reason to want to seek revenge against the witness. Public notice that there is to be a hearing will generate more speculation in the press and, inevitably, in gang circles, including the Bulldogs and MS-13. Any disclosure on the record at the hearing, no matter how carefully worded, of the issue that prompted the hearing also will spur speculation, probing and possibly leaks. Hence, there is no safe way to carve out a part of the hearing that may be publicly aired without risking the security of the witness and his family and without threatening to undercut the integrity of the homicide investigations. For these reasons, the

December 18, 2012 hearing should be conducted under seal and public notice of the hearing should not be given.

Finally, the Court must make detailed findings to support the closure of the courtroom. McIntosh, 933 A.2d at 379 ("[i]n light of the important interests at stake, the trial judge should always provide a statement of reasons for excluding particular persons from the courtroom, especially in the face of a defense objection") (internal quotation marks omitted). We request that the Court make these findings during the hearing.

CONCLUSION

For the reasons discussed herein, the Court should grant this motion. A proposed Order is attached as Exhibit A.

Respectfully submitted,

RONALD C. MACHEN JR.
United States Attorney

BY: _____

Fernando Campoamor-Sánchez
Alessio D. Evangelista
Margaret J. Chriss
Assistant United States Attorneys
555 4th Street, N.W.
Washington, D.C. 20530

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, this 17th day of December 2012, I caused a copy of the foregoing Motion and proposed Order to be served by e-mail on Santha Sonenberg and Jonathan Anderson, of The Public Defender Service for the District of Columbia, 633 Indiana Ave., N.W., Washington, D.C. 20004.

Assistant United States Attorney

Exhibit A

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

UNITED STATES OF AMERICA	*	
	*	**Case No. 2009-CF1-9230**
v.	*	**J. Fisher**
	*	**Closed Case**
INGMAR GUANDIQUE	*	

UNDER SEAL

ORDER

Upon consideration of the government's Motion to Seal the December 18, 2012 Status Hearing, the opposition by defense counsel, and for the reasons stated under seal at the December 18, 2012 hearing, it is this ___ day of December 2012 hereby:

ORDERED that the motion is granted.

SO ORDERED.

_____
Gerald I. Fisher
Associate Judge

Copies to:

Fernando Campoamor- Sánchez
Alessio D. Evangelista
Margaret J. Chriss
Assistant United States Attorneys
555 4th Street, N.W.
Washington, D.C. 20530

Santha Sonenberg
Jonathan Anderson
The Public Defender Service for the District of Columbia
633 Indiana Ave., N.W.
Washington, D.C. 20004

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Felony Branch

UNITED STATES OF AMERICA	:	
	:	**Case No. 2009 CF1 9230**
v.	:	**Judge Gerald I. Fisher**
	:	**Status: February 7, 2013**
INGMAR GUANDIQUE	:	

UNDER SEAL

MOTION TO FILE UNDER SEAL MOTION TO COMPEL PRODUCTION OF THE USAO-EDCA FILES, FBI FILES, UN-REDACTED RECORDED PHONE INTERVIEW TRANSCRIPTS, "SOURCE MATERIAL" AND BOP DOCUMENTS

Pursuant to the protective order issued by this Court in the above-captioned case on December 18, 2012, counsel is required to file under seal Mr. Guandique's Motion to Compel Production of the USAO-EDCA Files, FBI Files, Un-Redacted Phone Interview Transcripts, "Source Material" and BOP Documents. Counsel understands that in order for the substantive motion to be filed under seal, it must be accompanied by a motion to file it under seal and a proposed order. Counsel notes that Mr. Guandique continues to object to the protective order. To comply with the requirements of that order, however, and the procedural requirements for a filing a motion under seal, counsel is filing this motion to seal and accompanying proposed order.

Respectfully submitted,

Jonathan W. Anderson
Bar No. 475306
Public Defender Service
633 Indiana Avenue, N.W.
Washington, DC 20004
(202) 824-2740

Counsel for Ingmar Guandique

CERTIFICATE OF SERVICE

A copy of this motion has been served, electronically, upon Margaret Chriss, Esq., Office of the United States Attorney, 555 4th Street, N.W., Washington, D.C. 20530, Margaret.Chriss@usdoj.gov, this 6th day of February, 2013.

Jonathan W. Anderson

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Felony Branch

UNITED STATES OF AMERICA	:	
	:	**Case No. 2009 CF1 9230**
v.	:	**Judge Gerald I. Fisher**
	:	**Status: January 4, 2013**
INGMAR GUANDIQUE	:	

ORDER

It is this ___ day of February, 2013, hereby ORDERED that the defendant's Motion to Compel Production of the USAO-EDCA Files, FBI Files, Un-Redacted Phone Interview Transcripts, "Source Material" and BOP Documents shall be filed under seal.

_____
Associate Judge Gerald I. Fisher
Superior Court of the District of Columbia

Copies to:

Jonathan W. Anderson, Esq.
Public Defender Service
633 Indiana Ave., N.W.
Washington, D.C. 20004

Margaret Chriss, Esq.
United States Attorney's Office
555 4th Street, N.W.
Washington, D.C. 20530

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Felony Branch

UNITED STATES OF AMERICA	:	
	:	**Case No. 2009 CF1 9230**
v.	:	**Judge Gerald I. Fisher**
	:	**Status: February 7, 2013**
INGMAR GUANDIQUE	:	

UNDER SEAL

MOTION TO COMPEL PRODUCTION OF THE USAO-EDCA FILES, FBI FILES, UN-REDACTED RECORDED PHONE INTERVIEW TRANSCRIPTS, "SOURCE MATERIAL" AND BOP DOCUMENTS

Mr. Ingmar Guandique, through counsel, respectfully moves this Honorable Court to compel production of the files regarding Armando Morales created by the United States Attorney's Office in the Eastern District of California (USAO-EDCA) and the Federal Bureau of Investigations (FBI). In reply to the United States' Opposition to the Defense's Motion to Compel (hereinafter "Opposition"), Mr. Guandique supplements his original motion to compel production of the un-redacted telephone interview transcripts, the undisclosed "source material," and the Bureau of Prisons (BOP) documents related to Armando Morales.

THE COURT'S AUTHORITY AND APPLICABLE STANDARDS

This Court has the authority to "fashion post-conviction discovery procedures as may be required to give meaning and substance to the objectives of the law." *Gibson v. United States*, 566 A.2d 473, 478 (D.C. 1989) (citing *Harris v. Nelson*, 394 U.S. 286, 298-300 (1968)). The Court's discretion is guided by "what is right and equitable under the circumstances and the law, and directed [towards] a just result." *Gibson*, 566 A.2d at

478 (quotations omitted). In seeking this just result, "the trial court may order post-conviction discovery by borrowing from familiar discovery procedures as appropriate, 'whether these are found in the civil or criminal rules or elsewhere," in order that the post-conviction issues "receive fair and meaningful consideration." *Id.* (quoting *Harris*, 394 U.S. at 300). At a minimum, this Court should apply Criminal Procedure Rule 16 to the case at hand.

Rule 16 requires the government to disclose documents in its possession, custody, or control that are "material to the preparation of the defendant's defense." Superior Court Rule of Criminal Procedure 16(a)(1)(C). "In order to establish materiality, the defense must demonstrate a relationship between the requested evidence and the issues in the case." *United States v. Curtis*, 755 A.2d 1011, 1014-15 (D.C. 2000). This "threshold showing of materiality is not a high one." *Id.* at 105. The defendant need only show "a reasonable indication that the requested evidence will either lead to other admissible evidence, assist the defendant in the preparation of witnesses or in corroborating testimony, or be useful as impeachment or rebuttal evidence." *Id.* Thus, even information that is not itself admissible evidence is discoverable if it could "play an important role in uncovering admissible evidence, aiding witness preparation," or otherwise assist the defense. *United States v. Lloyd*, 992 F.2d 348, 351 (DC Cir. 1993). Mr. Guandique has shown, as set forth below, a "reasonable indication" that the requested documents will lead to admissible evidence, assist in the preparation of witnesses for the upcoming evidentiary hearing, or be useful as impeachment or rebuttal evidence.

In addition to its obligations under Rule 16, the government's *Brady* obligations also extend to information and items that, though "not admissible themselves"

nonetheless "'could lead to admissible evidence.'" *United States v. Mahaffy*, 693 F.3d 113, 131 (2d Cir. 2012) (quoting *United States v. Gil*, 297 F.3d 93, 104 (2d. Cir. 2002);[1] *see also Felder v. Johnson*, 180 F.3d 206, 212 (5th Cir. 1999) ("Inadmissible evidence may be material under *Brady*."); *United States v. Brown*, 650 F.3d 581, 589 n.12 (5th Cir. 2011) (same); (*Paradis v. Arave*, 240 F.3d 1169, 1179 (9th Cir. 2001) (noting that *Brady* material consists of admissible evidence or inadmissible evidence that could have been used to impeach a government witness); *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999) ("Inadmissible evidence may be material if the evidence would have led to admissible evidence.");[2] *but see Zualaga v. Spencer*, 585 F.3d 27, 32 (1st Cir. 2009) (inadmissible evidence not material for *Brady* purposes); *Hoke v. Netherland*, 92 F.3d 1350, 1356 n.3 (4th Cir. 1996) (same).

THE USAO-EDCA FILES

The representations that the government has made thus far regarding what Assistant United States Attorney Dawrence "Deuce" Rice, Jr. (AUSA Rice), of the USAO-EDCA, knew about Armando Morales's communication with the Fresno County Sherriff's Department (FCSD) are inaccurate. As discussed in detail below, significant

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[1] The D.C. Court of Appeals has implicitly reached the same conclusion. *See Miller v. United States*, 14 A.3d 1094, 1108 (D.C. 2011) ("An important purpose of the prosecutor's obligations under *Brady* is to 'allow[ ] defense counsel an opportunity to investigate the facts of the case and, with the help of the defendant, craft an appropriate defense) (citation omitted); *Sykes v. United States*, 897 A.2d 769, 777, 781 (D.C. 2006) (noting the importance of using the information in preparation of a case and highlighting that earlier disclosure would have enabled defendant to conduct additional pretrial investigation).

[2] *See also Wood v. Bartholomew*, 516 U.S. 1 (1995) (polygraph results showing possible deception not *Brady* because they were inadmissible and they would not have affected defense counsel's strategy or preparation).

inaccuracies have been revealed by the government's recent disclosure of redacted transcripts of phone conversations between Morales and the FCSD.

What members of the United States Attorney's Office (USAO) knew or should have known about Morales's provision of information to the FCSD before trial will be an important part of the litigation of *Brady* issues in this case. Because the government's representations regarding what AUSA Rice knew are unreliable, this Court should order the government to disclose all of the USAO-EDCA files on Morales. Disclosure of the USAO-EDCA files will permit defense counsel the opportunity to examine the files for any additional inaccuracies and afford the defendant a more complete understanding of what members of the USAO knew or should have known about Morales before trial.

In its December 4, 2012, letter[3] the government claimed that AUSA Rice affirmatively stated to the USAO-DC that he "did not" know "about the interviews or the information that came out of the interviews." Indeed, the government's letter gives the clear impression that the only inkling AUSA Rice might have had was a seemingly out-of-the-blue request by "local law enforcement" for a Rule 35 on behalf of Morales "sometime after Mr. Morales's sentencing," a request that Rice dismissed out of hand, making "clear that he would not file such a motion." 12-4-12 Letter at 2.[4]

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[3] The 12-4-12 Letter was provided to defense counsel on December 4, 2012, although it is dated November 21, 2012.

[4] The letter's third paragraph, in full, reads as follows:

> After receiving the transcripts of these 1998 interviews, we contacted the AUSA who handled Mr. Morales's 1996 case in the EDCA to determine if he knew about the interviews or the information that came out of the interviews. He did not. The AUSA said that sometime after Mr. Morales's sentencing, local law enforcement approached him about whether he would consider a Rule 35 motion for Mr. Morales, and the AUSA made it clear that he would not file such a motion. The AUSA

The redacted phone interview transcripts indicate that representations made in the letter are not accurate. During a phone call on May 29, 1998, Sergeant Marty Rivera of the FCSD told Morales that he had "*got permission to, uh, with [Deuce] Rice, to talk to you regarding these investigations and to get some authority to, once again sit down and talk to you.*" PT-2[5] at 12 (emphasis added).[6] Sgt. Rivera's statements make clear that, contrary to the representations in the government's 12-4-12 letter, AUSA Rice *did know* about the interviews, and that the contacts from "local law enforcement" regarding Morales consisted not only of a request for a Rule 35 motion, but a *request to conduct the interviews* with Morales regarding certain investigations.

The transcripts also suggest that the representation in the 12-4-12 letter that AUSA Rice was only contacted *once* by "local law enforcement" regarding a Rule 35 motion is contrary to fact. During a call on May 25, 1998, Sgt. Rivera told Morales he

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> stated that he never heard from local law enforcement again about Mr. Morales.

12-4-12 Letter at 2.

[5] There are seven phone interview transcripts, marked 1 through 7 by the government. They are referred to here as PT-#.

[6] This statement was made in the context of Morales requesting immunity for, at least, a murder he committed as an aider and abettor (if his version is to be believed). The relevant portion of PT-2 at 12 is:

> [Morales]: I want you to bring me something on paper saying that you're [not] gonna go and charge me with any of these crimes … that we're gonna talk about … because I'm not, I [redacted] trigger was pulled.
>
> [Sgt. Rivera]: Okay, what I, what I would tell you right now is that there's no .. D.A., we've already gone to the Feds and got permission to, uh, with DUCE RICE, to talk to you regarding these investigations and to get some authority to, once again sit down and talk to you. And, see if there's anything to work with.

would "talk to the U.S. Attorney" about "getting a sentence reduction" and that he had "*already talked to him a little bit.*" PT-1 at 3. From the context of the conversation, it is clear that Rivera had already spoken with "the U.S. Attorney" about a sentence reduction, moving Morales out of USP Atlanta, or perhaps arranging the interview, and planned to speak with him *again* about a sentence reduction.[7]

Furthermore, although Rice is not mentioned directly in subsequent interviews, it appears that members of FCSD contacted either Rice or other federal law enforcement officials for various reasons, including moving Morales out of the federal prison system and/or to a prison in California.[8] Given that the FCSD went to Rice in order to obtain permission to conduct the interviews with Morales, it is likely he was also at least one of

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[7] The transcripts reads as follows:

> [Sgt. Rivera]: ... I can get you moved from, from where you're at right now to a different place. You know, I told, [redacted] that. And provided we have a ... a . are you still there ...
> [Morales]: Yeah, I can hear you.
> [Sgt. Rivera]: Okay. And provided that ... you give me good stuff. I can, if you give me some really good stuff I'm willing to uh, talk to the U.S. Attorney. I've already talked to him a little bit. But, I'm willing to talk to him about getting you a sentence reduction if you give me some really dynamite stuff, okay?
> [Morales]: Yeah.
> [Sgt. Rivera]: I mean, I'm not, I'm ... that's straight up front. I talked to [redacted] I told him that a little bit. Uh, but I mean ... for mean to give you a sentence reduction, I' mean, I've really gotta have something really, really good.

PT-1 at 3.

[8] *See, e.g.*, PT-3 at 9 ("I'm gonna grease the skids during this week before I go up, so that once I get to ... talk to you, so I can have you moved someplace."); PT-5 at 8 ("[Morales]: You know maybe you can have me transferred ... find some institution in California .... [Sgt. Rivera]: M – uh ARMANDO I understand that and that's exactly what I plan to do. I plan to make arrangements during this next week ..."); PT-6 at 3 ("The last time that I talked to him you know ... I told him I wanted to bring you to California").

the people they contacted about having Morales transferred out of USP Atlanta to a prison in California or close to California.

The representations in the 12-4-12 letter regarding what AUSA Rice knew simply do not fit with the statements made by Sgt. Rivera in the phone transcripts.[9] Because of the representations regarding AUSA Rice made thus far by the government are inaccurate, this Court should order the disclosure of all of the USAO-EDCA's files regarding Armando Morales to defense counsel.

THE FBI FILES

Any connection between Morales and the Federal Bureau of Investigations (FBI) is important to the *Brady* issues in this case because the FBI was actively involved in the investigation and prosecution of Mr. Guandique and are therefore a part of the "prosecution team" for *Brady* purposes under even the most narrow definition of the term. The recently disclosed redacted phone transcripts show that the FBI's connection to Morales – and the information he provided to the FCSD – was far more significant than the government has thus far represented.

The government's 12-4-12 letter represents that in 2012 it obtained and reviewed the USAO-EDCA file regarding Morales's 1996 case and discovered that Morales had

[9] The 12-4-12 letter also states that AUSA Rice also spurned an offer made by Morales's attorney – before Morales pleaded guilty in the federal case – of "information about a police shooting and two murders" in exchange for favorable treatment from Rice, because Rice "would not do anything *until he knew what Morales had to say*." 12-4-12 Letter at 2-3 (emphasis added). According to the letter, Rice explained to the USAO-DC that he did not "follow up" on this offer because "he believed it was in the community's best interest to obtain the longest possible sentence for Mr. Morales." *Id.* at 3. When AUSA Rice was subsequently contacted by the FCSD about a Rule 35, he must have inquired – as he did with Morales's attorney – about "what Morales had to say." In other words, particularly given the communications mentioned in the phone transcripts by Sgt. Rivera, even the limited disclosures we have thus far indicate that it is likely that AUSA Rice learned from the FCSD what Morales had told them.

been interviewed by the Bureau of Alcohol, Tobacco, and Firearms (ATF). 12-14-12 Letter at 2. The letter also contains representations regarding ATF documents contained in the file and conversations it had regarding those documents with ATF Agent Colene Eowan who interviewed Morales on October 17, 1996. *Id.* The letter makes no mention, however, of the participation of FBI Agent Ronald Eowan[10] in that October 17, 1996 interview or any other contact between Morales and the FBI. Although FBI Agent Ronald Eowan participated in the October 17, 1996, interview of Morales, the government's 12-4-12 letter characterized this as an interview by the ATF. *See* 12-4-12 Letter at 2. When defense counsel requested the FD-302 form, which FBI agents are required to complete following interviews,[11] the government represented to this Court that "[b]ecause it was an ATF investigation they did not have a requirement to prepare a 302.... FBI Agent Ronald Eowan did not prepare a 302." Tr. 1/4/13 at 43.

The phone transcripts show, however, that Morales provided FBI Agent Eowan with some of the same information that he provided to the FCSD during the interviews. Furthermore, during two separate interviews Sgt. Rivera stated that Morales had previously provided information to FBI Agent Eowan (and the FBI generally). The ATF and ATF Agent Eowan are never mentioned, suggesting that it was FBI Agent Eowan

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[10] To avoid confusion between the two Agent Eowans, this motion refers to them along with their respective agency (e.g. "FBI Agent Eowan").

[11] An FD-302 is a form required to be filled out by FBI agents after an interview, which reports or summarizes the interview. *See* FBI Manual of Administrative Operations and Procedures, Part II § 10-13.3 ("Whenever a person being interviewed could be called upon to testify at any time in a future trial, administrative-type hearing, or quasi-judicial proceeding, the results of the interview shall be reported on [an] FD-302."); *see also id.* § 10-13.13 ("On occasion, an Agent will be requested to participate in an interview with an [AUSA] and will be specifically directed not to record the interview on an FD-302.... [I]f such a request is made, the Agent should decline to participate in the interview[.]").

with whom the FCSD was communicating regarding its interviews with Morales, and that the FBI – not just the ATF – that had officially interviewed Morales in the past.[12]

The fact that Morales had previously provided FBI Agent Eowan with some of the information he later provided to the FCSD was referenced in the first recorded phone interview on May 25, 1998:

> [Morales]: Look, if you guys can't, can't get me immunity for whatever I have to offer and I need immunity, then I don't think I should go forward with this.
> [Sgt. Rivera]: Is this what you're talking, are, are these the same thing[s] that you have already talked to RON EOWAN from the FBI about?
> [Morales]: I think I mentioned a few things to him, not everything. I never told him everything.

PT-1 at 9.

The fact that Morales had provided information to FBI Agent Eowan came up again during the second phone interview on May 29, 1998:

> [Sgt. Rivera]: Okay. Let me ask you this, is this information that you've provided to RON EOWAN already with the FBI?
> [Morales]: Just trying, I was fishing him. I was trying to pull him, right?
> [Sgt. Rivera]: Uh huh (affirmative).
> [Morales]: At first, but you know what, I saw that they weren't trying to work with me.

PT-2 at 6-7.

The transcripts make clear that FBI Agent Eowan was actively involved in interviewing Morales and was likely in communication with the FCSD regarding its interviews with Morales. As a result, there is a strong likelihood that there are FBI files related to Morales. While the government has attempted to downplay the FBI's contacts

[12] FBI Agent Eowan and AUSA Rice are the only federal agents referenced in the un-redacted portions of the telephone interview transcripts.

with Morales, it has never claimed – despite specific requests from the defense – that there are not FBI files related to Morales.[13]

Because there is a strong likelihood that there are FBI files related to Morales, because those files are important to the *Brady* issue presented by this case, and because the government has attempted to downplay FBI Agent Eowan's connections to Morales, this Court should order the government to disclose all of the FBI files related to Morales.

THE BOP FILES

Beginning at least as early as the trial, when the government – without having previously disclosed them under Rule 16 – used Bureau of Prison (BOP) documents regarding Morales to corroborate Morales's trial testimony, the defense has repeatedly asked the government to provide the BOP documents related to Morales. The government complains that "the defense seeks 13 years of documents from 10 institutions[.]" Opposition at 4 n.1. The government obtained at least some of those documents before the trial in this case, and has now had more than a year to gather additional documents. All the government has produced thus far, however, is a single-page letter written by Morales and representations regarding its review of "official visitor log books."

The government refuses to acknowledge which of the Morales-related BOP documents it currently has or offer any justification for not disclosing those documents. Conspicuously absent from the government's Opposition is any claim that the only Morales-related BOP document in its possession is the one already disclosed to the

[13] Indeed, even when pressed to provide a specific response regarding the 302, the government qualified its statement that FBI Agent Eown "did not prepare a 302" by immediately stating, "We're still double checking but we have checked for that and it does not exist, *as far as we know*." Tr. 1/4/13 at 43 (emphasis added).

defense. The fact that – as the government repeatedly states – it is continuing to obtain documents is not a justification for not disclosing the BOP documents related to Morales that are currently in its possession.

The government also complains, in a footnote, that the defense has made "no attempt to explain why [the documents are] relevant to the matter at hand." Opposition at 4 n.1. Although we have explained the relevance of the documents, the government does not need any explanation: it knows the importance of the documents, which is why it refuses to even identify the BOP documents that are in its possession or admit to possessing them. The government knows that the BOP is part of the Department of Justice, that the government consulted with BOP employees prior to trial and that it presented a BOP custodian of records as a witness at trial. Therefore, any information the BOP had regarding Morales "coming forward" on other cases is important to the *Brady* issues in this case. Specifically, the BOP files likely contain, as explained below, information related to Morales's status as an informant and special treatment requested by the FCSD or others.[14]

1. Intake Forms

The Federal Bureau of Prisons Intake Screening Form, which counsel understands is completed at least every time a BOP prisoner is placed in a new BOP facility and

[14] Furthermore, much of Morales's testimony related to his time in BOP facilities, including when he allegedly heard the confession, his example of adhering to the code of silence despite being assaulted and injured, his decision to give up the code because of time spent in a BOP "Skills" program and a visit by his family while he was in a BOP facility, and that prior to the 2008 he had not had a visit from his family in 14 years. As the government undoubtedly knows, information that corroborates or contradicts that testimony is contained in the BOP files. Any information in the BOP files which contradicts Morales's testimony, is relevant to Morales's bias, or would lead to impeachment or bias information is highly relevant to the *Brady* issues presented in this case.

potentially every time a prisoner transfers units, specifically requires the prisoner to state, inter alia, whether he has "assisted law enforcement agents in any way[.]" The BOP must have a generated a large number of such forms for Morales, who has been incarcerated in 10 different BOP facilities and been placed in different units within those facilities. In other words, there are numerous BOP documents which have recorded Morales's statements about whether or not he "ever assisted law enforcement in any way." If his answer was "yes" on any of these forms, the BOP had information that contradicted Morales's testimony and should have led to investigation by the government, pre-trial, into whether his claim that he had adhered to a code of silence prior to 2009 was false. If his answer was "no," that was a false statement and shows that Morales was scheming to obtain different treatment at different times from the BOP, given that he requested protection within the BOP as early as 1997.

Despite counsel's specific requests for the intake forms, and the specific demand for the forms contained within the defendant's original motion to compel, the government has not denied having any of Morales' intake forms, and has not articulated – because it cannot – any justification for not providing those forms to the defense.

2. Documents Related to the FCSD Interviews and Transfer Requests

The phone interviews also demonstrate that it is highly likely that the BOP had information regarding Morales's work with the FCSD. The transcripts make clear that, early on in the interviews, the FCSD offered Morales a transfer from USP Atlanta, and subsequent interviews show that they then acted on Morales's request to be transferred. *See* PT-1 at 2-3 ("you wanted a, a transfer from where you're at"; "if you don't think any of those things would do you any good, well then … what more could, uh, we offer ya");

PT-2 at 8 ("we can move you"); PT-2 at 9 ("I know that" federal prisoners can be transferred to state prisons); PT-3 at 9 ("I'm gonna grease the skids during this week before I go up, so that once I get to ... talk to you, so I can have you moved someplace."); PT-5 at 8;[15] PT-5 at 10 ("I'm gonna work on ... trying to see how I can make arrangements so we can uh make our conversations easier either by uh, seeing about getting you a transfer or what we need to do."); PT-6 at 2 ("trying to get you over here"). The FCSD also informed Morales that it had communicated with someone (who is unknown to the defense because of the redactions, but presumably was a federal agent of some kind) about transferring Morales to California. PT-6 at 3 ("I told him I wanted to bring you to California.... I wanted to bring [you] to California, so that we can ... be more secure as far as ... being able to talk to you and if I need more information, have you readily at hand."). Again, however, the government neither acknowledges whether it has such documents in its possession nor offers any justification for refusing to disclose them.

3. Gang Unit Documents

Defense counsel has also specifically requested, and referenced in our first motion to compel, documents related to Morales's debriefing with the gang unit at USP Atlanta

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[15] The relevant portion of PT-5 at 8 reads:

[Morales]: You know maybe you can have me transferred ... find some institution in California where you have more access ... than here. This isn't easy, it's not easy.

[Sgt. Rivera]: M – uh ARMANDO I understand that and that's exactly what I plan to do. I plan to make some arrangements during this next week and see how we can...

and other BOP gang units.[16] The government's conspicuous silence regarding these documents continues: it neither denies possession of gang unit documents nor offers any justification for hiding these documents from the defense.

Because the BOP documents related to Armando Morales are relevant to the issues in this case and there is a strong likelihood they will be admissible or lead to admissible evidence, and because the government has no justification for refusing to disclose them, this Court should order their immediate disclosure.

THE INDEFINITELY DELAYED DISCLOSURE OF THE SECOND "SOURCE DOCUMENT" AND ANY OTHER DOCUMENTS THE GOVERNMENT IS STILL "INVESTIGATING"

The government has acknowledged that it is blocking defense access to the second of "the two source documents referenced in [its] January 3, 2013 letter" because its "investigation with respect to the second document is continuing." Opposition at 5. The government's opposition to the motion to compel and other representations regarding its "ongoing investigation" suggest that it is also withholding other documents because the documents have not been fully "investigated" by the government. This is not a justification for delayed disclosure, which ultimately delays the defense investigation and will at least delay, if not permanently impair, the just resolution of this case.[17] There is simply no reason, other than the government's attempt to gain a tactical advantage, for delaying the disclosure of relevant documents until the government – in its own estimation – has completed any investigation that might stem from the contents of the

[16] See the defendant's original motion to compel at pages 9-12 for more detail regarding this issue.

[17] Furthermore, the government has already acknowledged that some of the documents relevant to the issues now presented by this case have been destroyed by government agents because of the passage of time. Any further delay will likely result in the destruction of more relevant documents.

documents. This Court should order the immediate disclosure of the second "source document" and any other discoverable documents the government is withholding for the purpose of gaining a tactical advantage.

THE REDACTED PORTIONS OF THE TRANSCRIPTS

After more than three weeks of delay, and only after defense counsel filed a motion to compel with this Court, the government disclosed seven heavily-redacted transcripts of recorded phone calls between Morales and the FCSD. The government offers two justifications for the redactions: 1) this Court (or the Court of Appeals) may modify or rescind the protection order, and 2) the information is not relevant. Neither of these justifications has merit.

First, the government's argument that the "*public* release of this information would pose a serious safety risk" is not a justification for not disclosing the information *to the defense*. As the defense explained in its motion to compel, the protective order prevents the defense from disclosing the information to the public, and the defense has adhered to that order. The fact that this Court or the Court of Appeals may ultimately determine that some or all of that information should be disclosed *to the public* is not a reason for not disclosing it *to the defense*. If there is a sufficient basis for keeping the information secret, the protective order will be upheld, in which case the government has no reason for concern and therefore should disclose it to the defense. If, however, there is not a sufficient basis for hiding the information from public view, there is certainly no justification for hiding it from the defense. The defense made this argument in its original motion to compel, *see* Motion to Compel at 7, but the government's opposition

offers no response to this logic. Because there is no justification for the redactions, this Court should order the government to provide defense counsel with un-redacted copies.

The government also argues that it redacted only "information that is not relevant to this post-conviction matter, including details about the three homicides[.]" Opposition at 4. The details regarding the homicides are relevant to these proceedings. Defense counsel needs to know the case numbers, the names of the decedents, the names of the suspects, and the nature and details of the information provided by Morales in order to investigate what the authorities did with the information Morales provided and what benefits Morales received.

Other than the two un-redacted and seven redacted transcripts, the government has not disclosed any other documents regarding these three murders. Without the detailed information contained in the redactions, defense counsel cannot determine on its own what has happened or is happening with the investigations and prosecutions of the individuals named by Morales.[18] For example, fifteen years have passed since Morales provided this information to the FCSD, and the defense is entitled to investigate why: Was there a determination made that some or all of Morales's information was incorrect, or that for some other reason Morales's information was not reliable?[19] Did the

[18] The government has at various times claimed that there were "two [ongoing] homicide investigations," Motion to Seal December 18 Status Hearing at 1, 6, but more recently claimed that there was only "an ongoing investigation," Opposition Motion at 4, using the singular to indicate there is only one. Given the government's inability to accurately represent *how many* of the three homicide cases involve "ongoing" investigations, defense counsel is entitled investigate the status of these investigations on its own and the redacted information is necessary for that purpose.

[19] The difference between the information in the two un-redacted transcripts versus the seven redacted transcripts highlights this issue. One of the two un-redacted transcripts reveals that Morales essentially gave the FCSD everything necessary to prosecute a murder: he admitted to [redacted]

authorities rely, in any way, on the information he provided? For example, was he presented to a grand jury or was the information he provided used in an arrest warrant or search warrant affidavit? Without the decedent's name, suspect's name, and case number we cannot search for legal documents such as an arrest warrant affidavit.

The detailed information is also important to investigation regarding what benefits Morales received or requested in exchange for providing the information. The contrast between the un-redacted information and the redacted information highlights this problem. With respect to one of the murders, we know that Morales admitted to participating in the murder as an aider and abettor, and that he requested immunity for committing that murder. In contrast, virtually all of the information regarding the murder of the female victim has been redacted, and we know only that the victim was a woman and that Morales, at least initially, denied being present at the murder. We do not know, however, whether Morales implicated himself in any way, for example as a co-conspirator or an accessory after the fact, or if he would have any reason for seeking

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[redacted], offered to provide the name of the triggerman, and offered to testify. We know from the redacted transcripts that Morales subsequently provided the name of the alleged triggerman. Because Morales by himself essentially gave the Fresno authorities enough to prosecute the murder, there are only a few reasons why the prosecution could have been delayed. One potential reason is that the authorities had credibility concerns, another is that Morales recanted. Both of those reasons would be relevant to this case either as newly discovered evidence or evidence in support of a *Brady* claim. On the other hand, because the information was redacted from the transcripts, we know essentially nothing about the murder of the female victim or what information Morales provided to the authorities regarding that murder. Was Morales a witness on whom the prosecution could build its case, or was the information he provided only inadmissible hearsay that required additional investigation? Did Morales offer to help the government obtain more information? We know nothing about what might have happened to the prosecution of that case and – unless the redacted information is provided – will never know what the authorities did in response to the information given to them by Morales.

immunity or other favorable treatment from the government with respect to that case. The information Morales provided with respect to that case would inform that question.[20]

The detailed information regarding these three homicides also relates to Morales's testimony at trial. The following examples are an incomplete list offered to support defense counsel's argument for the materials: 1) Morales testified in this case that he had never testified before, Tr. 11/4/10 A at 17, which could be proven false if Morales testified before a grand jury, at a preliminary hearing, or at trial in any of the three homicides before November 4, 2010. 2) Morales testified at trial that he came forward with respect to Mr. Guandique but not others because Guandique, unlike the others, "was targeting innocent females." *Id.* at 131-32. The details of the homicide of female victim, and investigation stemming from that information, would illuminate whether the victim was what Morales would refer to as an "innocent female." 3) Morales testified that he finally came forward regarding Guandique's alleged confession because he did not "seek [his] other ... homeys' approval anymore." *Id.* at 61. Information regarding the homicide of the female victim, or the other homicides, which showed Morales was offering information against one of his "homeys" would contradict that testimony. 4) Morales testified that he had not "come forward" in other cases because the perpetrators were "already convicted" and Guandique "got away with it." *Id.* at 103, 131. With the names of the suspects provided by Morales in the three murders, defense counsel could

[20] Furthermore, with the case number, decedent's name, or name of the suspect defense counsel may obtain legal documents to the case that might contain information regarding benefits provided to Morales (e.g. an arrest warrant that refers to information obtained from a paid informant or cooperator).

investigate whether the suspects were "already convicted" or incarcerated, and whether they had "gotten away with it" at the time Morales came forward with his information.[21]

The government has also redacted far more than "details about the three homicides." For example, the name of one of the interview participants, and *everything* that interview participant says, is redacted from the three transcripts involving that participant (or participants). *See* PT-1, PT-4, PT-5. The identity of the participants in the interviews is relevant because a key issue regarding the *Brady* claim is who within the government knew what and when did he/she/they know it (*e.g.* if the other participant was a federal agent or someone in communication with a federal agent), and also may relate to benefits Morales received (*e.g.* if the other participant is Morales's family member or Morales's lawyer).

Throughout the transcripts the context surrounding a number of other redactions makes clear that the information is not a "detail about the three homicides." In some instances, the government appears to have redacted offers made by the FCSD and requests made by Morales. *See, e.g.*, PT-1 at 10 ("[Sgt. Rivera]: ... The only thing I can guarantee you is this ... [REDACTED] Uh, I wanna talk to you. I am not gonna offer you ... immunity."); PT-3 at 14 ("[Morales]: So, in order for you to protect me and my family, man, [REDACTED]. [Sgt. Rivera]: Okay. I'll take care of that, don't worry about that."). The benefits requested and provided to Morales may inform the *Brady* issue (e.g. transfers to different BOP facilities) or constitute new evidence of Morales's bias. *See Springer v. United States*, 388 A.2d 846, 857 n.9 (D.C. 1978) ("even if it were established that an informant had not in fact received payment for information in a

[21] During one of the phone interviews, Morales claims that the suspects in the three homicides were, at the time of the interview, at liberty. PT-2 at 3.

particular case, the nature, character, duration, and extent of his relation with the government authorities in prior cases may be illuminative on the issue of his motive to curry favor, *i.e.*, bias"). In at least one instance, the government redacted Morales apparently elaborating on a detailed scheme to fabricate a false explanation of the FCSD visit, which involved notarized documents. PT-4 at 4.[22] Evidence that Morales engaged in schemes aimed to deceive are relevant to both the *Brady* and new evidence issues. There are also at least 14 pages that are redacted entirely or almost entirely. PT-5 at 4-7; PT-6 at 4-8; PT-7 at 1-5. And in one of the transcripts the government has blacked out virtually everything except for the initial greetings and the end of the call when Morales hung up. PT-7. It is unlikely that all of these redactions are "details of the three homicides."

Because there is no justification for the redactions and because there is a "reasonable indication" that the redacted information has a relationship to the issues in the case, and may be either admissible evidence or information that leads to admissible evidence, or is useful for the preparation of witnesses or cross-examination, this Court should order the government to turn over the un-redacted versions of the phone interview transcripts.[23]

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[22] The relevant portion of PT-4 at 4 is:

> [Morales]: And then I'm gonna send you a copy of all the transcripts and everything and then I'm gonna send you a letter that's certified, right?
> [REDACTED]
> [Morales]: From a notary saying that I'm asking you [REDACTED]
> [Sgt. Rivera]: Okay, stop right there. Uh ... [REDACTED.]

[23] For all the reasons the government should be required to provide the un-redacted phone interview transcripts, its motion to have defense counsel return the two un-redacted transcripts should be denied. Furthermore, this Court ordered the government to disclose the transcripts to us at the December 18 hearing regarding the protective order. Tr.

Conclusion

Wherefore, Mr. Guandique moves this Court to order the government to immediately disclose to defense counsel the USAO-EDCA documents, FBI documents, and BOP documents related to Armando Morales, the un-redacted transcripts of the recorded phone calls, the undisclosed "source material," and any other documents discoverable pursuant to Rule 16 or *Brady* currently in the government's possession, custody, or control.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this motion has been served, electronically, upon Margaret Chriss, Office of the United States Attorney, 555 4th Street, N.W., Washington, D.C. 20530, Margaret.Chriss@usdoj.gov, this 6th day of February, 2013.

Jonathan W. Anderson

12/18/12 at 62. The government argues that since it turned the un-redacted transcripts over it now "understand[s] the risks of releasing the information in the transcripts is greater than we initially thought." Opposition Motion at 5 n.2. The government had almost a year to "understand" any risks before the December 18 hearing. Furthermore, the government has not explained any new risks to defense counsel.